

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1977

NO. 77-435

ARTHUR F. SWANSON, Petitioner,

v.

STATE OF WASHINGTON, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE  
WASHINGTON STATE COURT OF APPEALS  
DIVISION I

CHRISTOPHER T. BAILEY  
Prosecuting Attorney  
King County Courthouse  
Seattle, WA 98104

JAMES S. KEMPTON  
Counsel for Petitioner  
615 Lyon Building  
607 Third Avenue  
Seattle, WA 98104

September 13, 1977

TABLE OF CONTENTS

	PAGE	
OPINIONS BELOW	1.	INDEX OF AUTHORITIES CITED
STATEMENT OF JURISDICTION	2.	
QUESTIONS PRESENTED	2.	U.S. Constitution:
CONSTITUTIONAL PROVISION INVOLVED	3.	United States Constitution Amendment V
STATUTES INVOLVED	3.	
STATEMENT OF THE CASE	4.	
REASONS FOR GRANTING THE WRIT	4.	
CONCLUSION	6.	

Appendix "A"-Opinion of the Washington  
Court of Appeals,  
Division I

Appendix "B"-Order of the Washington  
Court of Appeals denying  
Application for Rehearing

Appendix "C"-Order of Washington  
Supreme Court denying  
Application for Leave to  
Appeal

Appendix "D"-Order of Washington Court  
of Appeals Applying Mandate

Appendix "E"-Order of United States  
Supreme Court denying  
Stay of Mandate

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1977

NO. \_\_\_\_\_

ARTHUR F. SWANSON, Petitioner,

v.

STATE OF WASHINGTON, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE  
WASHINGTON STATE COURT OF APPEALS  
DIVISION I

Now comes, James S. Kempton,  
Attorney and Counselor at Law, for and  
on behalf of the Petitioner herein,  
Arthur F. Swanson, and prays that a  
Writ of Certiorari issue to review the  
judgment of the Washington State Court  
of Appeals, Division I, entered in the  
above-entitled cause on September 7,  
1976.

OPINION BELOW

The opinion of the Washington State  
Court of Appeals, Division I, is reported  
at 16 Wn.App. 179, 554 P.2d 364, and is

1.

appended as Appendix A. Application for  
rehearing by the Petitioner in the  
Washington State Court of Appeals was  
denied on January 19, 1977, and said  
Order is appended as Appendix B. Peti-  
tioner sought review in the Washington  
Supreme Court and said application for  
review was denied on June 8, 1977, and  
said Order is appended as Appendix C.  
Mandate was issued from the Court of  
Appeals on June 16, 1977.

STATEMENT OF JURISDICTION

The judgment of the Washington  
State Court of Appeals was entered  
September 7, 1976. Application for  
rehearing was denied on January 19, 1977.  
Application for review by the Washington  
Supreme Court on June 8, 1977. Mandate  
was issued by the Court of Appeals on  
June 16, 1977, the date Petitioner  
exhausted his State remedies. The  
jurisdiction of this Court is invoked  
under 28 U.S.C.A. 1257(3).

QUESTIONS PRESENTED

I.

Whether Revised Code of Washington,  
chapter 9.01.050(1), under which the  
Court took jurisdiction of the offense,  
is unconstitutionally vague and overbroad.

II.

Whether the Court denied Due Process  
by not correctly applying the law in  
R.C.W.9.24.050 on the basis of an action  
which took place partly within the State

2.

of Washington so that they could assert jurisdiction.

### III.

Whether the Courts of Washington have jurisdiction of the offense under R.C.W.9.24.050(1), when the only actionable act was the publication which took place entirely in Canada and outside of the State of Washington.

#### CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision which the present petition involves is the Fifth Amendment to the United States Constitution which provides as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense or be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

#### STATUTES INVOLVED

R.C.W.9.01.050(1)  
R.C.W.9.24.050

#### STATEMENT OF THE CASE

Petitioner directed the preparation of a financial statement of a corporation which was found to be false. It was never seen in the State of Washington outside of the Board of Directors of the corporation. It was "published" only in Canada. The only Washington cases on this particular statute say the crime is not in the preparation of the report but only in the "publication" of the report, the intent being to protect the public.

The Trial Court then relied on R.C.W.9.01.050(1) saying the crime had been committed in Washington "in part."

Petitioner contends, among other things, that one cannot be convicted in Washington for "part" of an act committed in Canada, which the record does not show to even be a crime in Canada.

#### REASONS FOR GRANTING THE WRIT

The questions presented by Petitioner are substantial Federal Constitution issues concerning Due Process that have not yet been specifically addressed by this Court and which have been erroneously answered by the Courts in Washington. The within petition presents precisely and unequivocally the questions of whether the statute used to invoke jurisdiction is too vague to be valid; whether the Washington Courts refused to follow their own case law in order to invoke jurisdiction over an act which did not occur within the State; and lastly, whether the Courts of Washington have

jurisdiction of an offense under their statute when the only cause of action was publication which took place entirely in Canada and outside the State of Washington.

The facts contained in the record are not in dispute. The questions raised here are solely question of law, thus presenting the Court with an excellent record upon which to decide the significant questions raised by Petitioner.

The Washington Courts held the statute in question as not being too vague to be unconstitutional. No case was cited to affirm this, although there are cases and commentaries which indicate the statute in question is too vague to be of any use. This phrase has never been before this Court for determination as to whether it is sufficiently clear under this type of statute to be constitutional.

The Washington Court exercised jurisdiction on the proposition that the report was "made" in Washington. In doing so, they overlooked their own decisions on what constitutes a "making" in this type of situation, as well as the meaning thereof as presented to them on appeal from other jurisdictions. By this gross lack of following the applicable law they failed to give the Petitioner a fair hearing and violated Due Process in respect to his right to a fair hearing.

The basic question is whether this type of statute can be invoked by a State to exercise jurisdiction over Petitioner

when it is absolutely clear under the Washington law, and the law from other jurisdictions, that one cannot be indicted for what was done by another party in a foreign country.

This question of how far, if at all, a State can extend and claim extra-territorial jurisdiction has never been addressed to this Court, although there are several cases on similar federal issues. Several States have the exact same statutes, and many have similar statutes which may or may not be of importance in this regard. Many of these other statutes are as vague as the one in question, although some do not suffer this fault.

A decision by this Court on the efficacy of laws affecting extra-territorial jurisdiction, especially as regards foreign countries, would be of great benefit to all the States in drafting legislation which would protect both society as a whole and alleged offenders as well.

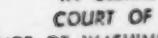
#### CONCLUSION

It is respectfully submitted that the one statute in question is too vague to be enforceable, and furthermore, it tempts States to invoke it to extend their jurisdictional limits beyond what is necessary to protect their own citizens. It is also submitted that when a Court deliberatively, or otherwise, overlooks its own law in order to reach a decision in conflict with that law, that this is a denial of the Due Process rights of the Petitioner. Because of these reasons

plenary review should be granted in this Court and Petitioner's request for a Writ of Certiorari should be granted.

Respectfully submitted,

By: JAMES S. KEMPTON  
Attorney and Counselor  
at Law  
615 Lyon Building  
607 Third Avenue  
Seattle, Washington  
98104

**FILE**  
IN CLERKS OFFICE  
COURT OF APPEALS  
STATE OF WASHINGTON - DIVISION 1  
DATE December 7, 197  
  
CHIEF JUDGE

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON, )  
Respondent, )  
v. ) No. 3757-I  
ARTHUR F. SWANSON, ) Division One  
Appellant. ) Filed SEP 7 1978  
ANDERSEN, J.

## **FACTS OF CASE**

The defendant, Arthur F. Swanson, is an attorney at law and certified public accountant who practiced his professions in Spokane, Washington.<sup>1</sup> At a trial in King County, he was convicted of the crime of making and publishing a false report of a corporation. On this appeal, he questions various aspects of the statute under which he was brought to trial in this state and the statute under which he was charged and convicted.

There is no substantial dispute as to the essential facts out of which the charge arose. The defendant's own testimony included the following.

Northwest Pacific Capital Corporation was a Washington corporation which officed in Bellevue, Washington. It had approximately 12 shareholders. Each shareholder was a developer or promoter and

<sup>1</sup>The defendant herein is not Arthur D. Swanson, the King County attorney.

each of them brought some kind of what were referred to as "deals" into the corporation with him.

For the most part, these deals consisted of certain contingent rights to purchase a wide variety of properties. The properties that such purchase rights related to included a motel, apartment house, ranch, timber and mining rights, patent, manufacturing and sales rights, and the like.

Some of these deals were evinced by earnest money agreements and others by options to purchase. Some of the options to purchase were oral only.

Each of the deals shared a common characteristic -- money was needed to finance it. The shareholders did not individually have the money to exercise their rights of purchase -- or to "close the deals" as they phrased it. It was their expressed hope that by banding together and working through one corporation in this fashion, they could somehow collectively obtain the financing which individually had eluded them.

Each of the shareholders in Northwest Pacific Capital Corporation was also an officer and a director in the corporation. There was a president, a secretary and a treasurer. All of the rest of the shareholders were vice presidents.

The defendant, in addition to being a shareholder who had himself brought a real estate deal into the corporation, was the treasurer and a member of the board of directors. The defendant was

also attorney for the corporation, and being a certified public accountant was the one who prepared its balance sheets.

Another of the shareholders, officers and directors, Sheldon Reeves, along with two other persons, went to Canada to negotiate with banks there in an effort to obtain the financing needed by the corporation. On Reeves' return, it was reported that one or more Canadian banks were prepared to commit a line of credit up to \$5 million to finance some of the corporation's deals.

The defendant was asked to draw up a financial statement showing the various deals the corporation had under its control so that it could be given to the Canadian bank or banks in connection with obtaining the line of credit. He flew from Spokane to the corporation's Bellevue office where he dictated and directly supervised the typing of a document entitled:

NORTHWEST PACIFIC CAPITAL CORPORATION  
BALANCE SHEET  
November 29, 1973

In this document, which the defendant prepared, each of the deals the corporation had under its control was listed as a property in the "asset" column at the value ascribed to the property by the shareholder who had brought in the deal. Each deal was likewise listed in the "liability" column at the amount it would require to make the purchase or close the particular deal.

Nowhere on the balance sheet was it indicated in any fashion that the properties there listed were merely contingent rights to

purchase or that the corporation did not actually own the properties. The result was that the balance sheet showed corporate assets of some \$48 million, liabilities of \$8 million and a surplus or net worth of \$40 million.<sup>2</sup> At the time, the assets which were in fact fully owned by the corporation had a value of less than \$30,000.

The defendant wrote a letter addressed to the directors and over his signature as a certified public accountant. It commenced:

Enclosed is a balance sheet showing the financial condition of Northwest Pacific Capital Corporation as of November 29, 1973.

Although the letter did contain some language of qualification and ~~(I) postote the attached sheet as disclaimer, etc.~~, nowhere in it nor on the balance sheet attached to the letter was there any indication that the defendant was also an officer, director and shareholder in the corporation whose balance sheet he had prepared.<sup>3</sup>

<sup>2</sup>For convenience, the figures here used have been rounded and approximations used.

<sup>3</sup>The full text of the defendant's letter reads:  
"November 29, 1973

"Board of Directors  
Northwest Pacific Capital Corporation  
Bellevue, WN 98009

"Dear Sirs:

"Enclosed is a balance sheet showing the financial condition of Northwest Pacific Capital Corporation as of November 29, 1973. This is based on cost wherever possible and on reasonable valuations as represented by Corporation members or third parties including appraisals by qualified persons.

"While the figures are thought to be reasonable and conservative time did not permit a thorough audit according to accepted auditing standards. Because of the lack of these auditing procedures I have

All of the directors except the defendant signed the balance sheet on lines provided for that purpose.

The defendant knew the letter and balance sheet were prepared for Reeves to take to Canada for presentation to a bank or banks there in connection with efforts to obtain the hoped for \$5 million corporate financing. The defendant also testified that he concurred with the corporate decision to send these to Canada.

The record before us reflects little of what transpired in Canada except for a stipulation that the balance sheet "was presented to the Toronto Dominion Bank, City Savings & Trust of Calgary, and Bank of Nova Scotia in Calgary, by Sheldon Reeves, . . ." and the two others, and the fact that all three were promptly arrested by Canadian authorities. Following that, the present charge was filed by the King County Prosecuting Attorney against the defendant. Evidently like charges were filed against several of the other directors as well.

The defense presented by the defendant was that the balance sheet was intended to be only an inventory of the corporation's deals and the defendant did not knowingly or otherwise make any false or

precluded from stating any opinion as to the fairness of this statement as a whole.

"Respectfully submitted,  
/s/ ARTHUR F. SWANSON  
Arthur F. Swanson  
Certified Public Accountant  
S. 310 1/2 Cedar Street  
Spokane, WN 99204

"AFS/nmg"

exaggerated statements therein. As the defendant testified, the document was supposed to be a "pro forma" balance sheet, but because of the haste with which it had been prepared, the qualifying term "pro forma" was inadvertently omitted from it.

The defendant defined "pro forma" as a kind of forecast -- what the balance sheet would look like if certain conditions happened in the future -- the conditions in this case being the exercise by the corporation of the various options to purchase. The defendant also testified that the document was not intended for the use of the public or for the use of anyone in the state of Washington except the corporate directors themselves.

This case presents five basic issues.

#### ISSUES

**ISSUE ONE.** Was sufficient evidence introduced to sustain the defendant's conviction of violating RCW 9.24.050, making it a crime to make and publish a false report of a corporation?

**ISSUE TWO.** Do courts of this state have jurisdiction of the offense charged since there was no publication of the balance sheet inside the state of Washington to anyone except the corporate directors who concurred in it?

**ISSUE THREE.** Are either RCW 9.24.050, defining the offense charged, or RCW 9.01.050(1), under which the courts of this state took jurisdiction of the offense, unconstitutional or otherwise invalid?

**ISSUE FOUR.** Did the trial court err in its instructions to the jury or in failing to give defendant's proposed instructions?

**ISSUE FIVE.** Did the trial court err in permitting it to be established on cross-examination of a defense witness that the witness stood separately charged with the same offense as the defendant?

#### DECISION

##### ISSUE ONE.

**CONCLUSION.** The trial court did not err in denying defendant's challenge to the sufficiency of the state's evidence and in refusing to direct a verdict for the defendant.

The defendant challenges the sufficiency of the evidence to sustain the conviction and seeks dismissal of the charge on various bases. This requires some analysis of the nature of the offense charged.

The statute under which the defendant was prosecuted reads:

False report of corporation. Every director, officer or agent of any corporation or joint stock association, and every person engaged in organizing or promoting any enterprise, who shall knowingly make or publish or concur in making or publishing any written prospectus, report, exhibit or statement of its affairs or pecuniary condition, containing any material statement that is false or exaggerated, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars.

RCW 9.24.050.

This statute has heretofore been construed in only two appellate opinions, State v. O'Brien, 143 Wash. 636, 255 P. 952 (1927) and State v. Pierce, 175 Wash. 461, 27 P.2d 1083 (1933).

Considering those two opinions together, we synthesize their rationale and holdings as to RCW 9.24.050 as follows: (a) this statute, which makes it a crime to make and publish a false report of a corporation, was enacted for the purpose of protecting members of the public who may have occasion to rely on such statements but not be conversant with the corporation's affairs; (b) it does not apply to statements made to shareholders and directors; (c) it does not apply to statements which are not published at some time and in some manner; (d) before there can be a violation of the statute, it must be proven that the statement was willfully, knowingly and falsely made, published and concurred in; and (e) the statute does not require that an intent to deceive or defraud be proven as an element of an offense thereunder. State v. O'Brien, supra; State v. Pierce, supra.

The trial court instructed the jury concerning the elements of the offense as follows:

To convict the defendant, Arthur [F.] Swanson, of the crime of making and publishing a false report of a corporation the state must prove beyond a reasonable doubt:

- (1) That on or about the 29th day of November, 1973, the defendant was an officer, director and agent of a corporation, Northwest Pacific [Capital] Corporation;
- (2) The defendant unlawfully and feloniously made a written report or statement of the affairs and financial conditions of Northwest Pacific Capital Corporation with the intent that it be published;
- (3) The defendant knew that the report or statement of the affairs and financial condition of Northwest Pacific Capital Corporation contained material statements which were either false or exaggerated;
- (4) The above acts occurred in King County, Washington;

and  
(5) That said report or statement was published.

If you find from the evidence admitted in this case that the state has proved beyond a reasonable doubt each of said elements (1), (2), (3), (4) and (5) then it will be your duty to return a verdict of guilty of making and publishing a false corporate report as charged in the information.

If you find from the evidence that the State has not proved beyond a reasonable doubt the foregoing elements, then it will be your duty to return a verdict of not guilty as to the information.

#### Instruction No. 3.

The jury was further instructed:

As used in the information in said cause and these instructions, "unlawfully and feloniously" means intentionally and purposely, but not accidentally, and without and beyond the authority of law.

#### Instruction No. 9.

Contrary to the position taken by the defendant on this appeal, the law did require, and the jury was instructed, that the unlawful act had to be knowingly committed and done intentionally, purposely and not accidentally.

The defendant next contends that the required publication element of the offense was not proven because the balance sheet was not published to the general public. He argues that as a matter of law the presentation of it to the Canadian bankers was insufficient to constitute publication. This argument fails because the jury was instructed as to the meaning of this term as follows:

The term "publish" as used in this information and these instructions means to make public; to make known; to put in circulation; to intentionally exhibit.

#### Instruction No. 5.

No exception was taken to this instruction, therefore, it became the law of the case. Seattle v. Harclaon, 56 Wn.2d 596, 597, 354 P.2d 928 (1960); State v. Robinson, 9 Wn. App. 644, 648, 513 P.2d 837 (1973), rev'd on other grounds, 84 Wn.2d 42, 523 P.2d 1192 (1974). Under the broad definition of the term "publish" in the court's instruction, the jury could well find that presentation of the balance sheet to the bankers did constitute a "publication." Furthermore, as noted in a somewhat analogous situation in State v. Pierce, supra at 468:

Whether the financial statement was mailed, given out by hand, or otherwise distributed to five persons, or five thousand, is immaterial in a prosecution under [RCW 9.24.050].

In determining the sufficiency of the evidence generally to sustain the conviction, our function as an appellate court is to determine whether there is "substantial evidence" to support the State's case; and in considering such evidence, we must assume its truth and view it most strongly against the defendant, allowing the State the benefit of all reasonable inferences. State v. Randecker, 79 Wn.2d 512, 515, 487 P.2d 1295 (1971); State v. Sims, 14 Wn. App. 277, 281, 539 P.2d 863 (1975).

Here the evidence established that the defendant's letter, which accompanied the balance sheet, was written in his capacity as a certified public accountant. (See footnote 3.) He left his signature off the balance sheet, although apparently all of the directors signed that sheet excepting only the defendant, and a line

had been provided on the sheet for an additional signature. There was testimony that a certified public accountant who prepares a balance sheet for a corporation in which he is a shareholder, officer and director violates his professional obligation of independence. There was evidence that the defendant was not a novice in corporations of this kind and that he had considerable first-hand knowledge concerning most of the various deals that he listed on the balance sheet. There was also evidence showing that he had prepared "pro forma" balance sheets before, had labeled them as such and was aware of how to do this and of the necessity for doing so.

The guilty verdict established that the jury did not believe the defendant's testimony concerning inadvertence, lack of knowledge and innocent intent. In making that determination, the jury was performing a function assigned to it under our judicial system, and one with which this court may not interfere on the present record. State v. Woody, 73 Wn.2d 179, 181, 437 P.2d 167 (1968); State v. Sims, supra at 282.

The jury was correctly instructed as to the elements of the offense charged. The evidence produced by the State viewed in the light most favorable to the State, as it must be, meets the legal test of sufficiency. The trial court correctly declined to dismiss the charge against the defendant.

#### ISSUE TWO.

CONCLUSION. When an essential element of an offense has been committed in the state of Washington, the offense has been committed

"in part" in this state as contemplated by RCW 9.01.050(1) and the courts of this state have jurisdiction over the subject matter of the offense.

The concept of jurisdiction of courts is generally split into two branches, jurisdiction over the subject matter and jurisdiction over the parties and to properly act in a case it is necessary that a court be vested with both jurisdictions. 20 Am. Jur. 2d Courts § 105 (1965). See Dike v. Dike, 75 Wn.2d 1, 8, 448 P.2d 490 (1968).

The courts of this state unquestionably have jurisdiction over the parties since the defendant has resided here at all times in issue. The defendant argues, however, that our courts have no jurisdiction over the subject matter of the action because publication of the corporate report was essential to a completed offense and inasmuch as such publication occurred in Canada and not within this state.

It is true, as has been pointed out by our State Supreme Court, that

[i]n the absence of a statute, the rule is that a person cannot be punished in the state where he does some act constituting a part of an offense or making the offense possible, if the offense were actually consummated in another state.

State v. Moore, 189 Wash. 680, 690, 66 P.2d 836 (1937).

However, as also pointed out in Moore, we do have such a statute in this state. It reads in pertinent part:

The following persons are liable to punishment:  
(1) A person who commits in the state any crime, in whole or in part.

(Italics ours.) RCW 9.01.050(1). The purpose of this statute is

to eliminate twilight zones affording safe haven to persons who commit offenses partly within this state and partly without it. State v. Moore, supra at 692.

The defendant also questions whether the offense was even committed "in part" in this state. As his argument goes, what was done in this state "was merely preparatory to and did not approach the 'culminating act' of 'publishing' in the Dominion of Canada, and additionally, since the 'publishing' of a false corporate financial report is the nexus of the crime, and there was no 'publication' in the State of Washington, or in the United States of America, that there was no crime committed which is cognizable in the State of Washington."

We agree that before the courts of this state have jurisdiction of an offense, more must be done within our state than just preparing for the commission of a crime elsewhere.

When an essential element of an offense has been committed within the state of Washington, the offense has been committed "in part" in this state, within the contemplation of RCW 9.01.050(1), and the courts of this state have jurisdiction over the offense. State v. Booher, 148 Wash. 149, 268 P. 167 (1928); State v. Moore, supra; 21 Am. Jur. 2d Criminal Law § 385 at 404 (1965); 4 R. Anderson, Wharton's Criminal Law and Procedure § 1507 at 88 (1957). As noted in 21 Am. Jur. 2d Criminal Law, supra:

It is necessary, however, to discriminate with great care between acts essential to the crime and acts merely incidental thereto.

It is true, as defendant points out, that the publication of the corporate report containing the allegedly false statements is a requisite element of the offense charged. It is also true, however, that

the material elements of the offense are in making, or concurring in the making, of the false statement and publishing or causing its publication.

State v. Pierce, 175 Wash. 461, 467, 27 P.2d 1083 (1933).

In the present case, the statements found by the jury to have been false were made by the defendant in this state, and with his concurrence in this state were sent to Canada to be shown to bankers there. Since these were essential elements of the offense charged, and were not merely preparatory or incidental thereto, the offense was committed in part within this state. Thus, our courts properly have jurisdiction over the offense of which the defendant was convicted. RCW 9.01.050(1).

Neither is it a defense, as the defendant suggests, that the courier taking the balance sheet to Canada may have changed his mind or been called back prior to giving it to the bankers and thus the offense might not have been completed. Here the report was published and the offense was completed, as the jury found. One in this state who fashions an arrow, fits it into a bow and launches it, cannot successfully defend against the consequences of such actions on the basis that had the situation developed differently, the arrow might have been deflected from the target before striking it.

The cases principally relied on by the defendant in support of his jurisdictional argument are People v. Buffum, 40 Cal.2d 709, 256 P.2d 317 (1953); People v. Werblow, 241 N.Y. 55, 148 N.E. 786 (1925) and Reass v. United States, 99 F.2d 752 (4th Cir. 1938). Those cases are all distinguishable from the present case since in none of them had any of the essential elements of the offenses charged been committed within the jurisdiction of those courts.

#### ISSUE THREE.

CONCLUSION. The defendant has not sustained his burden of proving that either RCW 9.24.050 or RCW 9.01.050(1) are constitutionally infirm or otherwise invalid.

The defendant challenges the validity of RCW 9.24.050, defining the offense charged, on the following additional grounds: that the statute is vague, lacks objective standards and does not require proof of an intent to deceive or defraud. The defendant similarly challenges RCW 9.01.050(1) on the ground that the words "in part" are vague and not capable of being understood by a person of common understanding.

As occurs with some frequency in criminal cases, the validity and constitutionality of the statutes under which the defendant was brought to trial and convicted are here challenged. This, of course, is the defendant's legal right. It must be recognized, however, that the challenger's burden in this regard is a very heavy one.

It is, after all, the people themselves who elect legislatures to enact the statutes which command what is right and prohibit what is wrong. The legislature has broad authority in this regard:

The power to determine what acts shall constitute crimes, and what acts shall not, and to prescribe punishment for acts prohibited belongs to the legislative branch of government. This power is said to be inherent in the state legislature and it is also comprehended in the general grant of legislative power contained in the state constitution. The power is exclusive and is not shared by the courts. So long as constitutional prohibitions are not infringed, the will of the legislature in this respect is absolute. But the power to define crimes is of course subject to the limitations contained in state and federal constitutions.

(Footnotes omitted.) 21 Am. Jur. 2d Criminal Law § 14 at 95 (1965).

Accord, Shea v. Olson, 185 Wash. 143, 153, 53 P.2d 615 (1936); 22 C.J.S. Criminal Law § 13 at 49 (1961).

Furthermore, as Justice Oliver Wendell Holmes so well expressed, it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.

Missouri, K. & T. Ry. v. May, 194 U.S. 267, 270, 48 L. Ed. 971, 24 S. Ct. 638 (1904).

An enactment of the legislature is presumed to be constitutional and should not be declared invalid unless it is shown beyond a reasonable doubt to be so. Washington Kelpers Ass'n v. State, 81 Wn.2d 410, 416, 502 P.2d 1170 (1972); Reesman v. State, 74 Wn.2d 646, 650, 445 P.2d 1004 (1968).

The courts of this state are firmly committed to the rule that one who challenges the validity of a statute has the burden of

establishing that invalidity. Bitts, Inc. v. Seattle, 86 Wn.2d 395, 399, 544 P.2d 1242 (1976); State v. Primeau, 70 Wn.2d 109, 111, 422 P.2d 302 (1966).

These rules are more than mere rules of judicial convenience. They mark the line of demarcation between legislative and judicial functions. Lenci v. Seattle, 63 Wn.2d 664, 668, 388 P.2d 926 (1964).

The defendant has not directed any case to our attention which directly holds that the statutes here questioned, or others which are substantially identical, are unconstitutional or otherwise invalid. We have read the authorities cited and have carefully reviewed them and the arguments which have been presented to us. In the opinion of this court, the defendant has not sustained his heavy burden of proving that the challenged statutes are unconstitutional or otherwise invalid in any respect. Under these circumstances, we do not believe that a lengthy dissertation on the various principles of law which have been presented for our consideration in this regard would serve any worthwhile purpose.

We do not find either RCW 9.24.050 or RCW 9.01.050(1) to be vague, nor does the former lack objective standards. Neither have we been persuaded that the legislature did not have the right to determine that an intent to deceive or defraud is not required as an element of the crime established by RCW 9.24.050. We therefore decline to hold either statute unconstitutional or otherwise invalid.

## ISSUE FOUR.

CONCLUSION. The trial court did not err in instructing the jury.

For convenience, we consider together the remaining jury instructions, given and proposed, concerning which the defendant has assigned error.

Error is assigned to the trial court's refusal to give the defendant's proposed instruction on circumstantial evidence. The instruction was of the so-called multiple hypothesis type which was considered by the court in State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975). It was there held that it is no longer necessary to give such an instruction and the jury need only be instructed, as it was here, that it must be convinced beyond a reasonable doubt that the defendant is guilty. State v. Gosby, supra; State v. Dobbs, 14 Wn. App. 613, 544 P.2d 134 (1975).

The defendant also assigns error to the trial court's refusal to give his proposed instruction setting out the elements which the state had to prove in order to convict the defendant of the offense charged. The only exception the defendant took to the court's failure to give that instruction was that he felt the defense was entitled to an instruction requiring the jury to be convinced beyond a reasonable doubt as to each necessary element of the offense. The "to convict" instruction given by the trial court did require just that. (See instruction No. 3.)

The defendant also assigns error to the trial court's instruction which advised the jury that in order to convict the defendant, the State need not prove the defendant intended to defraud anyone. As heretofore discussed, intent to defraud is not an element of the offense charged and the trial court properly acted within the ambit of its discretion in so instructing the jury.

The defendant's assignments of error with respect to instructions are not well taken.

## ISSUE FIVE.

CONCLUSION. It was within the sound discretion of the trial court to permit a witness to be impeached as to bias or interest by cross-examination showing that the witness stood separately charged with the same crime as the defendant for whom he testified.

One of the other directors of the corporation, who had signed the corporate balance sheet in question, was called and testified as a defense witness. During cross-examination, the deputy prosecutor was permitted over objection to elicit the fact that the witness was separately charged with the same offense. This is assigned as error.

Cross-examination of a witness to show bias, prejudice or interest is a matter of right, but the scope of such cross-examination is a matter resting within the sound discretion of the trial court. State v. Robbins, 35 Wn.2d 389, 396, 213 P.2d 310 (1950); State v.

Knapp, 14 Wn. App. 101, 107, 540 P.2d 898 (1975). See 5 R. Meisenholder, Wash. Prac. § 299 at 264 (1965).

It was within the sound discretion of the trial court to permit a witness to be impeached as to bias or interest by cross-examination showing that the witness stood separately charged with the same crime as the defendant for whom he testified. 98 C.J.S. Witnesses § 543 at 484 (1957); 2 C. Torcia, Wharton's Criminal Evidence § 463 at 404 (13th ed. 1972). See also State v. Wills, 3 Wn. App. 643, 645, 476 P.2d 711 (1970).

Affirmed.

ANDERSEN, J

WE CONCUR:

Swanson, J.      Hillman, Col.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, )  
Respondent, ) No. 3757-I  
v. )  
ARTHUR F. SWANSON, ) ORDER DENYING MOTION FOR  
Appellant. ) RECONSIDERATION

The appellant, Arthur F. Swanson, having filed his petition for reconsideration; the respondent, State of Washington, having filed its answer to said petition, and the court having determined that it should be denied; Now, therefore, it is hereby

ORDERED that the petition for reconsideration be, and  
the same hereby is, denied.

Done this 19<sup>th</sup> day of January, 1977.

Charles M. Nease  
Chief Judge

6.2  
6.1  
6.0  
5.9  
5.8

FILED  
THE SUPREME COURT OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

JEROME WAYNE SMITH,

Petitioner.

No. 44734  
(4180-I)

ORDER

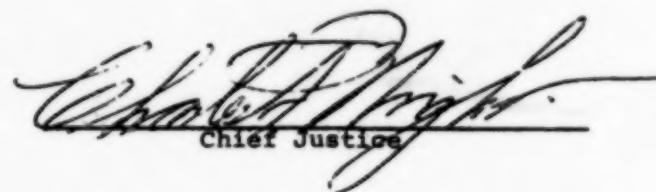
DENYING PETITION FOR REVIEW

The Court having considered the petition for review of the decision of the Court of Appeals in this cause, together with the answer thereto,

It is ordered that the petition be and it is hereby denied.

Dated this 8th day of June, 1977.

By the Court:

  
Chief Justice

16 Wn. App. 300

APPENDIX "C"

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ARTHUR F. SWANSON,

Appellant.

MANDATE

No. 3757-I

King

County No. 70214

The State of Washington to: The Superior Court of the State of Washington

in and for King County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I,

filed on September 7, 1976, became the decision terminating review of this court in the above entitled case on June 16, 1977. This cause is mandated to the superior court

from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion. The motion for reconsideration was denied by an order dated January 19, 1977; the petition for review was denied by an order dated June 8, 1977.

cc: Kempton, Savage & Gossard  
Mr. James S. Kempton  
Mr. Arthur F. Swanson

The Hon. Christopher T. Bayley  
King County Prosecuting Attorney  
Mr. Michael L. Cohen, Deputy  
Chairman, Board of Prison Terms  
& Paroles  
Reporter of Decisions  
Clerk of the Supreme Court



APPENDIX "D"

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 16th day of June, 1977.

Richard D. Taylor  
Clerk of the Court of Appeals, State of Washington,  
Division

SUPREME COURT OF THE UNITED STATES  
OFFICE OF THE CLERK  
WASHINGTON, D. C. 20543

August 3, 1977

James S. Kempton, Esquire  
Kempton, Savage & Gossard  
615 Lyon Building  
Seattle, Washington 98104

Re: Arthur F. Swanson v. Washington  
A-111

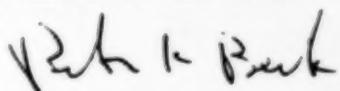
Dear Mr. Kempton:

Your application for stay in the above-entitled case has been presented to Mr. Justice Rehnquist, who has endorsed thereon the following:

'Denied  
Aug. 2, 1977  
WHR'

Very truly yours,

MICHAEL RODAK, JR., Clerk

By 

Peter K. Beck  
Assistant Clerk

th

cc: Michael L. Cohen, Esquire  
Deputy Prosecuting Attorney for King County  
King County Courthouse  
Seattle, Washington 98104

APPENDIX "D"